

## **EXHIBIT 5**

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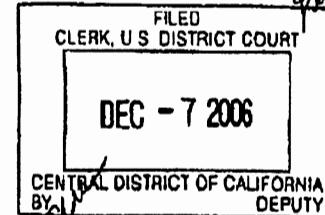
10 ANNE E. CLAYTON,

11 Plaintiff,

12 vs.

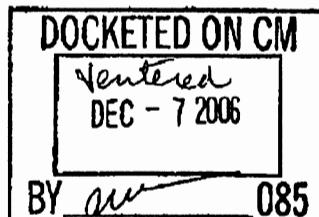
13 MERCK & CO., INC., a New Jersey  
14 Corporation; McKESSON  
15 CORPORATION, a Delaware  
corporation; DOES 1-50

16 Defendants.



CV 06-6398 FMC (PJWx)

ORDER GRANTING DEFENDANT'S  
MOTION TO STAY AND DENYING  
PLAINTIFF'S MOTION TO REMAND



This matter is before the Court on Plaintiff's Motion to Remand to State Court (docket no. 10), and Defendant Merck & Co., Inc.'s Motion to Stay Proceedings (docket no. 12), filed on November 3, 2006 and November 8, 2006, respectively. The Court has considered the moving, opposition and reply documents submitted in connection with the motions. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78, Local Rule 7-15. Accordingly, the hearing set for December 11, 2006, is removed from the Court's calendar. For the reasons and in the manner set forth below, the Court GRANTS Defendant's Motion to Stay and DENIES Plaintiff's

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1 Motion to Remand without prejudice to the filing of a renewed motion in the  
2 event that the Judicial Panel on Multidistrict Litigation ("JPML") does not  
3 transfer this case to Multidistrict Litigation ("MDL") No. 1789, *In Re: Fosamax*  
4 *Prods. Liab. Litig.*

5 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

6 Plaintiff, Anne E. Clayton, took the prescription drug Fosamax, which is  
7 manufactured and sold by Defendant Merck & Co., Inc. ("Merck") and  
8 distributed by Defendant McKesson Corporation ("McKesson"). Plaintiff filed  
9 her Complaint in the Superior Court for the State of California, County of Los  
10 Angeles, on September 28, 2006. Plaintiff alleges, *inter alia*, that Defendants  
11 misrepresented (affirmatively and through a failure to warn) that Fosamax was a  
12 safe and effective treatment for osteoporosis, Paget's Disease and other  
13 conditions. Plaintiff further alleges that, as a proximate result of injecting  
14 Fosamax, she has been permanently and severely injured.

15 On October 6, 2006, Defendant Merck removed the action to this Court on  
16 the basis of diversity under 28 U.S.C. § 1332, alleging that Defendant McKesson,  
17 a California citizen, is fraudulently joined. In her motion to remand, Plaintiff  
18 argues that joinder was proper. In its Opposition to the motion and in its  
19 separate Motion for Stay, Merck maintains that resolution of the question of the  
20 propriety of Plaintiff's joinder of McKesson should be deferred pending transfer  
21 of this action to the MDL proceedings in *In Re Fosamax Prods. Liab. Litig.*, and  
22 that all other proceedings in this action should be stayed until such time.<sup>1</sup>  
23 McKesson joins in Merck's Opposition to the motion to remand and the Motion

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25 <sup>1</sup>Pursuant to Rule 7.4 of the Rules of Procedure of the Judicial Panel on Multidistrict  
26 Litigation, the JPML issued a Conditional Transfer Order on November 2, 2006. Plaintiff's Motion  
27 to Vacate that Order is currently pending. See Request for Judicial Notice in Support of Merck &  
Co., Inc.'s Opposition to Plaintiff's Motion to Remand, Exhibits 1-2.

1 to Stay in all respects.

2 **STANDARD OF LAW**

3 "A trial court may, with propriety, find it is efficient for its own docket and  
4 the fairest course for the parties to enter a stay of an action before it, pending  
5 resolution of independent proceedings which bear upon the case." *Leyva v.  
6 Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979); *see also  
7 Landis v. North American Co.*, 299 U.S. 248, 254, 81 L. Ed. 153, 57 S. Ct. 163  
8 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in  
9 every court to control the disposition of the causes on its docket with economy of  
10 time and effort for itself, for counsel, and for litigants.").

11 **DISCUSSION**

12 A stay of all proceedings until such time as the JPML renders its final  
13 decision regarding transfer is in the interest of judicial economy. A steady  
14 succession of cases involving the drug Fosamax are being filed in this district  
15 and other districts throughout the country and are awaiting transfer to the MDL  
16 proceedings.<sup>2</sup> Given the similarity of this litigation to other recent  
17 pharmaceutical products liability litigation, the Court finds that there are likely to  
18 be many more cases (in this district or otherwise) which present the precise  
19 question of the propriety of joinder of Defendant McKesson and/or other  
20 "distributor" defendants.<sup>3</sup> Consideration of Plaintiff's remand motion by this

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22 <sup>2</sup> According to the JPML website, there are now 58 actions pending in MDL No. 1789, *In Re:  
Fosamax Prods. Liab. Litig.* See [http://www.jpml.uscourts.gov/Pending\\_MDLs/pending\\_mdls.html](http://www.jpml.uscourts.gov/Pending_MDLs/pending_mdls.html) (follow "Distribution of Pending MDL Dockets").

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24 <sup>3</sup> As Defendants point out, two Fosamax cases which name both Merck and McKesson as  
25 Defendants were recently removed (by Merck) to the district courts for the Northern and Southern  
26 Districts of California. See Request for Judicial Notice in Support of Defendant Merck & Co., Inc.'s  
27 Reply Memorandum in Support of Motion to Stay Proceedings, Exhibits 2-3. The Court takes  
judicial notice of the fact that Merck is raising the same issues of fraudulent joinder in those cases

1 Court at this juncture would therefore run the risk of inconsistent rulings between  
2 different judges in different districts and/or would constitute an inefficient use of  
3 judicial resources. Cf. *Stempien v. Eli Lilly & Co.*, 2006 U.S. Dist. LEXIS  
4 28408 \*4 (N.D. Cal. 2006) ("[E]ven if the Court were to grant Plaintiffs' motion  
5 to relate all Zyprexa cases naming McKesson Corporation in this district, judges  
6 in other California districts would nonetheless have to decide the issue, thus  
7 resulting in unnecessarily duplicative litigation, an inefficient use of judicial  
8 resources, and the risk of inconsistent results.").

#### CONCLUSION

10 Based on the foregoing, Defendant Merck & Co., Inc.'s Motion to Stay  
11 Proceedings (docket no. 12) is GRANTED. Proceedings in this case are  
12 STAYED until issuance of a final decision by the JPML regarding transfer or for  
13 sixty (60) days, whichever is earlier.

14 Plaintiff's Motion to Remand (docket no. 10) is DENIED without  
15 prejudice to the filing of a renewed motion if transfer is denied.

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17 IT IS SO ORDERED.  
18 December 7, 2006



19 FLORENCE MARIE COOPER, JUDGE  
20 UNITED STATES DISTRICT COURT  
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24 and has filed a similar motion to stay proceedings pending possible transfer to the MDL action in  
25 the Northern District case. See Fed. R. Civ. P. 201; *United States ex. rel. Robinson Rancheria*  
26 *Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (court may take judicial notice  
27 of "proceedings in other courts, both within and without the federal judicial system, if those  
proceedings have a direct relation to matters at issue.").